DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. CHECKERS DRIVE IN RESTAURANT and PATRICK JENKINS Respondents	Case Nos.: C-00-10355 I-00-10238 C-00-10356 I-00-10237 (Consolidated)

FINAL ORDER

I. Introduction

On August 18, 2000, the Government served two Notices of Infraction (Nos. 00-10355 and 00-10356) on Respondents Checkers Drive In Restaurant ("Checkers") and Patrick Jenkins. Notice of Infraction No. 00-10355 alleged that Respondents violated 21 DCMR 534.2, which requires the owner or other person in control of a storm water management facility to maintain the facility in good condition and to perform promptly any necessary repair and restoration of the facility, and 21 DCMR 532.4(c), which requires compliance with an approved construction plan for a non-point source. The Notice of Infraction alleged that the violations occurred at 1401 Maryland Avenue, N.E., and sought a fine of $100 for each violation. Notice of Infraction No. 00-10356 alleged that Respondents violated the same provisions at 2300 New York Avenue, N.E. That Notice also sought a fine of $100 for each violation.

Respondents did not answer the Notices of Infraction within the required twenty days after service (fifteen days plus five additional days for service by mail pursuant to D.C. Official Code §§ 2-1802.02(e), 2-1802.05). Accordingly, on September 14, 2000, this administrative

court issued separate orders finding Respondents in default on each Notice of Infraction and subject to the statutory penalties required by D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1802.02(f) and requiring the Government to serve a second Notice of Infraction.

The Government served second Notices of Infraction on September 20, 2000. Notice of Infraction No. 00-10238 is the second Notice of Infraction for the Maryland Avenue facility and Notice of Infraction No. 00-10237 is the second Notice of Infraction for the New York Avenue facility.

Mr. Jenkins filed timely answers to the second Notices of Infraction. In the Maryland Avenue matter, he pleaded Admit with Explanation to the charge of violating § 534.2 and Deny to the charge of violating § 532.4(c). In the New York Avenue matter, he pleaded Admit to the charge of violating § 534.2 and Deny to the charge of violating § 532.4(c). A hearing date was set for December 5, 2000 for the charges to which Mr. Jenkins pleaded Deny.

The hearing was held on December 5 and 6, 2000. Walter Caldwell, the inspector who issued the Notice of Infraction, appeared on behalf of the Government and Mr. Jenkins appeared on his own behalf. There was no appearance for Respondent Checkers. Pursuant to D.C. Official Code § 2-1802.03(b), the hearing proceeded in its absence. At the hearing, Mr. Jenkins moved for leave to enter pleas of Deny to all charges. The Government did not object, and I granted that motion.

Based upon the testimony of the witnesses, my evaluation of their credibility, and the items admitted into evidence, I now make the following findings of fact and conclusions of law.

II. Findings of Fact

A. The Maryland Avenue Restaurant

On June 22, 2000, Mr. Caldwell inspected the storm water management system at the Checkers Drive In Restaurant located at 1401 Maryland Avenue, N.E. (the "Maryland Avenue restaurant"). The storm water management system is a series of underground chambers intended to collect storm water runoff from the property and to remove pollutants before that water is ultimately discharged through the public sewer system to the Potomac River and its tributaries. One feature of the storm water management system is a chamber containing a sand and gravel filter. On June 22, Mr. Caldwell observed that the filter at the Maryland Avenue restaurant was clogged with grease, thereby rendering it unable to function properly.

Mr. Caldwell also identified two features of the system at the Maryland Avenue restaurant that, in his opinion, did not comply with the approved construction plan for that system. First, the system did not have a ladder permitting entry for inspection. In addition, the view into the system from at least one manhole was obscured due to a sheet of plywood placed below the manhole cover. No copy of the approved plan was introduced into evidence, however, nor was there any evidence that a nonpoint source permit was issued in connection with the construction of the system. As discussed below, the absence of such a permit makes it unnecessary to decide whether the system at Maryland Avenue was constructed in accordance with an approved plan. *See* pp. 7-8 *infra*.

B. The New York Avenue Restaurant

On June 9, 2000, Mr. Caldwell inspected the storm water management system at the Checkers Drive In Restaurant located at 2300 New York Avenue, N.E. (the "New York Avenue restaurant"). He observed standing water in the sand and gravel filter chamber of that system. He believed that to be an indication that the system had not been maintained properly, because, in his view, there should be no standing water in that filter chamber if 72 hours have passed since a rain event. He admitted, however, that his notes of the inspection state that the last rain event occurred "+/- 72 hours" previously. Based on that testimony, I find insufficient evidence to establish that there was standing water in the sand filter chamber more than 72 hours after a rain event. Moreover, I credit Mr. Jenkins' testimony that employees hosed down the parking lot at the New York Avenue restaurant every day. Thus, the water observed by Mr. Caldwell likely consisted, at least in part, of runoff from a more recent cleaning. The presence of the standing water, therefore, did not necessarily establish that the system was not working properly.

Mr. Caldwell also observed an accumulation of debris in the first chamber of the system. The purpose of the first chamber is to trap larger items of trash and debris before the water enters the filter chamber. The first chamber must be cleaned out regularly. If too much trash and debris accumulates, as it had on June 9, entry of water into the filter chamber is restricted, and the system is unable to serve its intended function.

Mr. Caldwell testified that the system at the New York Avenue restaurant deviated from the approved construction plan in three respects. First, he inserted a probe into the sand and gravel filter chamber all the way to the bottom. He felt only a hard bottom, and did not feel the resistance that one normally would expect if sand were present. He concluded, therefore, that the

system was not properly constructed, because it did not have the required sand. Second, he did not observe a dewatering valve in the filter chamber. He testified that such a valve was required by the plan. Because he did not go down into the chamber, however, Mr. Caldwell was not sure whether the valve was there. He did not see a valve, but ultimately testified that he did not know whether or not one was there. Mr. Caldwell also did not observe any cleanout pipes sticking out of the filter bed, even though, according to Mr. Caldwell, the approved plan called for them to do so. As with the Maryland Avenue restaurant, however, no copy of an approved plan was introduced into evidence, nor was there proof of the issuance of any nonpoint source permit in connection with construction of the storm water management system at New York Avenue. As with Maryland Avenue, the absence of any evidence of a nonpoint source permit makes it unnecessary to decide whether the system at New York Avenue was constructed in accordance with an approved plan. *See* pp. 7-8 *infra*

C. Ownership and Operation of the Restaurants

Based upon Mr. Jenkins' testimony, I find that the Maryland Avenue restaurant is leased and operated by QSF, Inc., and that Mr. Jenkins is a part-owner and an officer of that company. A separate company owns the property, but there is no evidence in this record of the name of that company.[1] Based on Mr. Jenkins' testimony I also find that a different company operates the New York Avenue restaurant, and that Mr. Jenkins is an officer of that company. There is no evidence in the record, however, of either the name of the company that operates the New York Avenue restaurant or the name of the company that owns that facility. In particular, the Government introduced no evidence that Checkers either owns or operates either restaurant.

[1] I note that in a subsequently-filed case involving the Maryland Avenue restaurant, *DOH v. H&J Investment, Inc.*, OAH No. I-00-11170, decided today, the Government introduced evidence tending to show that H&J Investment, Inc., the Respondent in that case, owns Maryland Avenue restaurant.

In addition to his status as an officer of the corporations that operate the restaurants, Mr. Jenkins controls operations at both restaurants. When Mr. Caldwell first visited the properties, the on-site employees reported to Mr. Jenkins and sought his approval before consenting to the inspections. Mr. Caldwell also met Mr. Jenkins at both properties after his inspections to discuss improvements there. At that time, Mr. Jenkins told Mr. Caldwell that he would arrange for certain maintenance and improvements. I also credit Mr. Jenkins' testimony that he supervised the building of both restaurants, including their storm water management systems.

D. The Failure to Respond to the First Notices of Infraction

1. Mr. Jenkins

Mr. Jenkins admitted that he received the first Notices of Infraction for both the Maryland Avenue and New York Avenue facilities. He claimed that he made copies of both forms, and gave the copies to an employee, with instructions to write two $100 checks, one for each notice, and to mail them. By itself, that testimony is insufficient to prove that the answers were mailed. As noted above, the answers have not been received. Moreover, Mr. Jenkins did not introduce evidence that would tend to establish that the mailing actually occurred, such as return receipts, copies of cancelled checks or a check register showing that checks had been written. Nor did he call the employee to testify. I find, therefore, that the evidence is insufficient to establish that one of Mr. Jenkins' employees mailed answers to the first Notices of Infraction.

2. Checkers

The Notices of Infraction for both the Maryland Avenue and New York Avenue restaurants were addressed to Checkers in care of Mr. Jenkins. Although Mr. Jenkins received

the Notices of Infraction, the Government offered no evidence that he was an agent for Checkers or was otherwise authorized to receive mail on its behalf.

III. Conclusions of Law

A. Section 532.4.

The Government alleges that Respondent violated 22 DCMR 532.4 at both the Maryland Avenue and New York Avenue restaurants. Section 532.4 is part of the District of Columbia's storm water management regulations, which govern the management of storm water runoff both during the construction of a project and after the project is completed. The intent of the regulations is to prevent pollution of the District's surface waters by contaminants that otherwise might be washed into those waters during storms.

Section 534.2 provides:

> Any nonpoint source permit issued may be suspended or revoked after a written notice to the permittee for any of the following reasons:
>
> * * *
>
> (c) Construction which is not in accordance with approved plans.

At first glance, § 532.4(c) appears only to specify a condition that authorizes the suspension or revocation of a nonpoint source permit. In this case, however, the Government does not seek to suspend or revoke any permit; instead it seeks a civil fine for Respondents' alleged failure to comply with an approved construction plan. Such a civil fine is authorized by 16 DCMR 3234.2(j), which classifies a violation of § 532.4(c) as a Class 3 civil infraction and describes the violation as "failure to comply with approved construction plan." Section 3234.2(j), therefore, authorizes the imposition of a fine in the circumstances described in

§ 532.4(c), *i.e.*, if the holder of a nonpoint source permit fails to comply with an approved construction plan. Although the Government may pursue suspension or revocation of a permit if the permittee has not complied with an approved construction plan, the clear intent of § 3234.2(j) is that a civil fine is an available alternative remedy for such non-compliance.[2]

While 16 DCMR 3234.2(j) permits the imposition of a civil fine, that fine may be imposed only if the Government proves the existence of all the elements specified in §532.4(c), *i.e.*, a nonpoint source permit must have been issued, a construction plan must have been approved in conjunction with the issuance of that permit, and the project at issue must have been constructed in some manner that does not comply with the approved plan. Here, the Government has not satisfied the first element of a violation – it has not shown that Respondents were issued a nonpoint source permit at either location. Although there was evidence of the issuance of various permits associated with the construction of both the Maryland Avenue and the New York Avenue facilities, there was no evidence that the Government issued a nonpoint source permit for Respondents' storm water management systems. Absent such evidence, the Government cannot meet its burden of proving violations of § 532.4(c) at either facility, and those charges must be dismissed.

[2] The relationship between 21 DCMR 532.4(c) and 16 DCMR 3234.3(j) parallels the relationship between 21 DCMR 506 (prescribing procedures for revocation of a building permit for noncompliance with an approved erosion and sedimentation plan) and 16 DCMR 3234.2(c) (establishing a fine for failure to comply with such a plan). *See DOH v. Crystal Pool, Inc.*, OAH No. I-00-10224 at 6-7 (Final Order, January 29, 2001).

B. Section 534.2

The other provision allegedly violated by Respondents at both the Maryland Avenue and the New York Avenue facility is 22 DCMR 534.2, which provides:

> The owner of the property on which a storm water management facility has been constructed, or any other person or agent in control of such property, shall maintain the facility in good condition, and promptly repair and restore whenever necessary all grade surfaces, wall, drains, structures, vegetation, erosion and sediment control measures, and other protective devices.

The term "storm water management facility" is not defined in the regulations. Given the overall purpose of the regulations and the specific context of the rule at issue here, I conclude that the term includes structures like those at both the Maryland Avenue and the New York Avenue facilities, *i.e.*, underground structures into which storm water flows for treatment before being discharged into the District's storm sewers. Section 534.2, therefore, requires the owners of the Maryland Avenue and New York Avenue restaurants and anyone else in control of those facilities to do two things: maintain them in good condition, and promptly repair and restore any of the features described in the regulation that may need such action.

The evidence establishes that action required by § 534.2 was not taken at either the Maryland Avenue or the New York Avenue restaurant. At Maryland Avenue, the undisputed testimony demonstrates that grease was clogging the gravel and sand filter in the storm water management system, making that filter unable to serve its function of removing pollutants from the stormwater that flowed through it. Because the filter could not function properly when Mr. Caldwell observed it, the storm water management system was not maintained in good condition.

At the New York Avenue restaurant, the accumulation of trash and debris in the first chamber demonstrated that the facility was not maintained in good condition because it restricted the entry of water into the sand and gravel filter chamber. The failure to remove the debris is a failure to maintain the system in good condition.

C. Respondents' Liability

Section 534.2 imposes liability upon the owner of the property where a storm water management facility is located and any other person or agent in control of that property. Both Checkers and Mr. Jenkins are named as Respondents on each Notice of Infraction. There is no evidence, however, that Checkers either owns or otherwise controls either property. The evidence shows that QSF operates the Maryland Avenue facility and that a different corporation owns that property. The evidence also shows that different corporations own and operate the New York Avenue facility. None of that evidence establishes that Checkers owns or operates either of the properties involved in this case.[3] Accordingly, there is no basis for holding it liable for the violations of § 534.2 that occurred at either restaurant.

The evidence does establish, however, that Mr. Jenkins was a "person in control" of both the Maryland Avenue and the New York Avenue facilities. At all relevant times, he was an officer of the companies that operated both facilities. He supervised the building of the restaurants, including the building of the storm water management facilities there. Staff members contacted him for instructions about how to deal with the Government inspectors who

[3] The record in *DOH v. H&J Investment, Inc.,* OAH No. I-00-11170, decided today, contains a letter from Checkers denying ownership or operation of the Maryland Avenue restaurant (the only property at issue in that case) and asserting that the restaurant is owned and operated by a franchisee. As it is not part of the record in this case, I have not considered that letter in deciding Checkers' liability. The Government's failure to introduce evidence concerning Checkers' liability, not the letter filed in the *H&J* case, is the basis for the ruling here.

visited the properties and he negotiated with Mr. Caldwell about possible ways to remediate the violations after the Notices of Infraction were issued. During those conversations, he told Mr. Caldwell about measures that would be undertaken, leading to the inference that he had the authority to direct that those measures be undertaken. This is sufficient to demonstrate that Mr. Jenkins had authority over day-to-day activities at both locations. This makes him a "person in control" of those facilities within the meaning of § 534.2, and makes him liable for the failure to maintain the storm water management facilities at both locations.

Violation of §534.2 is a Class 3 civil infraction, for which the fine is $100 for a first offense. 16 DCMR 3432.2(o); 16 DCMR 3201. Mr. Jenkins is liable for a fine in that amount for each violation, a total of $200.

D. The Failure to Respond to the First Notice of Infraction

The Civil Infractions Act, D.C. Code Official Code §§ 2-1802.02(f) and 2-1802.05, requires the recipient of a Notice of Infraction to demonstrate "good cause" for failing to answer it within twenty days of the date of service by mail. If a party does not make such a showing, the statute requires that a penalty equal to the amount of the proposed fine must be imposed. D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1802.02(f). The imposition of the statutory penalty is required, absent the showing of good cause, even if the underlying infraction is dismissed or a fine is not imposed. *DOH v. Washington General Contractors*, OAH No. I-00-10387 at 11 (Final Order, July 11, 2001); *DOH v. DRM & Associates,* OAH No. I-00-40309 at 14 (Final Order, January 23, 2002). ("The Council's purpose in enacting the penalty provisions of the Civil Infractions Act was to promote an efficient adjudication system by encouraging prompt responses to Notices of Infraction, regardless of whether any Respondent believes there is a valid

defense to a charge. . . . Therefore, even though [Respondents] were found not found liable for the infractions charged, they nevertheless are liable for the statutory penalty[,] an amount equal to the total fines sought in the Notices of Infraction . . . .)

Mr. Jenkins testified that he directed another employee to send a response to the first Notice of Infraction for each property. I have found, however, that the employee did not do so. An employee's failure to send a timely answer, even if directed to do so, does not constitute good cause for failing to answer. *DOH v. Zavarello,* OAH No. I-00-20234 at 4 (Final Order, July 2, 2002). ("Nothing in the Civil Infractions Act permits a Respondent to evade his or her liability for filing a timely answer by unilaterally delegating that responsibility to someone else.") Mr. Jenkins, therefore, must pay a statutory penalty of $200 for failing to answer the first Notice of Infraction for each restaurant without good cause, a total penalty amount of $400 in addition to the fine.

Because the Government served only Mr. Jenkins, there is no evidence that Checkers was properly served. Inadequate service upon a party constitutes good cause for that party's failure to file a timely answer. D.C. Official Code § 2-1802.02(f) (requiring penalty "if a respondent *has been served"*). (Emphasis added.) Therefore, Checkers is not liable for a statutory penalty.

IV. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2002:

ORDERED, that Respondents are **NOT LIABLE** for violating 22 DCMR 532.4(c) as alleged in the Notices of Infraction and those charges are **DISMISSED;** and it is further

ORDERED, that Respondent Checkers Drive In Restaurant is **NOT LIABLE** for violating 22 DCMR 534.2 as alleged in the Notices of Infraction, and those charges against it are **DISMISSED;** and it is further

ORDERED, that Respondent Patrick Jenkins is **LIABLE** for violating 22 DCMR 534.2 at both the Maryland Avenue restaurant and the New York Avenue restaurant; and it is further

ORDERED, that Mr. Jenkins did not demonstrate good cause for failing to answer the first Notices of Infraction; and it is further

ORDERED, that Respondent Patrick Jenkins shall pay a total of **SIX HUNDRED DOLLARS ($600)** in accordance with the attached instructions within twenty (20) calendar days of the mailing date of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if Respondent fails to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, starting from the date of this Order, pursuant to D.C. Code Official Code § 2-1802.03 (i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real and personal property owned by Respondent pursuant to D.C. Official Code § 2-1802.03(i) and the sealing of Respondent's business premises or work sites pursuant to D.C. Official Code § 2-1801.03(b)(7).

FILED 07/10/02

_____

John P. Dean
Administrative Judge